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Takings Law Update: Determining the "Relevant Parcel" and When to Apply Heightened Scrutiny for Exactions

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Heightened Scrutiny for "Exactions"
Evolving Jurisprudence following *Koontz*

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In *Koontz v. St. Johns River Water Management District*, the Supreme Court elaborated on the standard it set in *Nollan v. California Coastal Comm'n*, and *Dolan v. City of Tigard* that "[*A] unit of government may not condition the approval of a land -use permit on the owner's relinquishment of a portion of his property unless there is a "nexus" and "rough proportionality" between the government's demand and the effects of the proposed land use*."[1] The Court clarified that this heightened scrutiny takings standard applies where demands are for money, not just dedications of real property, and even where the demand is refused and the permit denied. The Court reasoned, "*as in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury*." The burden of proof is on the government to demonstrate that the mitigation proposed is related and roughly proportional to impacts created by the development.[2]

Where the question concerns the rationality of a government regulation, the burden of proof is on the challenger and the standard is only whether the government "*could rationally have decided*" that the land-use regulation could achieve its objective.[3] However, where the government is asking for a dedication of property in exchange for a permit, the Court determined that a more demanding takings standard should apply to ensure a "precise fit" between the burden and the permit condition." [4] In *Nollan*, the Court reasoned that additional judicial scrutiny was required because the government may be tempted to use permitting leverage to work around the just compensation requirement:

> *"We are inclined to be particularly careful about the adjective ['substantial' in terms of the relationship to a legitimate public purpose] where the actual conveyance of property is made a condition for the lifting of a land use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective."* [5]

In Dolan, the Court extended the Nollan standard to require not only an "essential nexis" between the mitigation required and the impacts of the development, but also "rough proportionality: "*No precise mathematical calculation is required but the City must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development*."[6]

The *Koontz* case left open many questions as to when to apply heightened scrutiny. It did not address the rule that has been adopted in several States that Nollan and Dolan apply only to permitting fees that are

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[1] *Koontz v. St. Johns River Water Mgmt. Dist.,* 133 S. Ct. 2586, 2589 (2013).
[2] *Id*. at 2596.
[3] *Nollan v. California Coastal Com.,* 483 U.S. 825, 843, n.1, 107 S. Ct. 3141 (1987), (dis. opn. of Brennan. J.)
[4] *Id*. at 848 (The majority deliberately adopted more demanding standard).

[5] *Id*. at p. 841 (majority opinion)
[6] *Dolan v. City of Tigard*, 512 U.S. 374, 391, 114 S. Ct. 2309 (1994).

imposed on ad hoc basis, and not to fees that are generally applicable.[7] It did not clearly explain how to distinguish monetary "exactions" subject to heightened scrutiny from other monetary fees.[8] It created confusion as to whether heightened scrutiny should apply to voluntary, optional, density bonus programs.

In Koontz, the Court stated: "*so long as a permitting authority offers the landowner at least one alternative that would satisfy Nollan and Dolan, the landowner has not been subjected to an unconstitutional condition,"*[9] but the facts and reasoning are incongruent. The developer in *Koontz* initially proposed to develop 3.7 acres, while preserving the remaining 11 acres of wetland with a conservation easement.[10] The District proposed instead that he develop only 1 acre, install a more costly storm management system and deed the District a conservation easement on the remaining 13.9 acres.[11] The District also offered the alternative of proceeding with his original plan if he agreed to hire contractors to make improvements to District-owned land several miles away. The District never actually made a demand. [12] The District said that it "would also favorably consider" other alternatives that were "equivalent" to its suggested offsite mitigation projects. [13]

The Court reasoned that the option to develop a smaller portion of the site instead of paying for off-site mitigation was irrelevant because it was not consistent with the developer's plan.

[*R*]*espondent's suggestion that we should treat its offer to let petitioner build on 1 acre as an alternative to offsite mitigation misapprehends the governmental benefit that petitioner was denied. Petitioner sought to develop 3.7 acres, but respondent in effect told petitioner that it would not allow him to build on 2.7 of those acres unless he agreed to spend money improving public lands.* [14]

Although the lawsuit was dismissed as premature, Seattle's density program was challenged in 2014 by the "Koontz Coalition." Seattle's program allows increased density and height in exchange for affordable housing construction or "in lieu" fees without adhering to an "essential nexis" and "rough proportionality" analysis. Austin also allows density bonuses in exchange for affordable housing and other benefits through Planned Unit Development zoning without an individualized determination of rough proportionality.[15] Although not mired in a lawsuit, it has been ridiculed in a utube video for unprincipled

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[7] *Id*. at 2608, dis. opn. of Justice Kagan; See also California Building Industry Assn. v. City of San Jose, 61 Cal. 4th 435, 189 Cal. Rptr. 3d 475, 351 P.3d 974, 2015 Cal. LEXIS 3905 (2015), cert. denied 136 S. Ct. 928 (2016) Justice Thomas, concurring in the denial of certiorari ("*lower courts have divided over whether the Nollan/Dolan test applies in cases where the alleged taking arises from a legislatively imposed condition rather than an administrative one. That division shows no signs of abating*.")

[8] *Id*. at 2607 dis. opn. of Kagan, J. ("*But once the majority decides that a simple demand to pay money—the sort of thing often viewed as a tax—can count as an impermissible "exaction," how is anyone to tell the two apart*?")

[9] *Koontz v. St. Johns River Water Mgmt. Dist.,* 133 S. Ct. 2586, 2598 (2013).

[10] *Id*. at 2592.

[11] *Id*. at 2593 (To reduce the development area the District suggested that he install a subsurface stormwater management system beneath the building site, and install retaining walls).

[12] *Id*. at 2612, dis. opn. of Justice Kagan ("*It informed Koontz that his applications did not meet legal requirements; it offered suggestions for bringing those applications into compliance; and it solicited further proposals from Koontz to achieve the same end.*")

[13] *Id.* at 2593, majority opinion.

[14] *Id*.

[15] ORDINANCE NO. 20080618-098, adopted on June 18, 2018, available at http://www.cityofaustin.org/edims/document.cfm?id=118294 ("The council retains the legislative authority to determine whether PUD zoning is appropriate regardless of whether the proposed development meets the standards prescribed by this division.")

Title search: Takings Law: Determining the “Relevant Parcel” in Standard Taking Cases and Understanding When to Apply Heightened Scrutiny for Exactions

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